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Supreme Court, U.S.
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Supreme Court of the United States

OCTOBER TERM, 1959

No. 586

ARTHUR STEIER,

Petitioner,

against

NEW YORK STATE EDUCATION COMMISSIONER, NEW YORK CITY BOARD OF HIGHER EDUCATION and BROOKLYN COLLEGE,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CHARLES H. TENNEY,
SEYMOUR B. QUEL,
Attorneys for Respondents
New York City Board of Higher Education and Brooklyn College,
Municipal Building,
New York 7, N. Y.

SEYMOUR B. QUEL,
JOSEPH F. GIBBONS,
of Counsel.

January 22, 1960.

INDEX

Subject Index

	PAGE
Statement of Issue	1
Facts	2
Argument—The petition fails to present any substantial questions for review by this Court	9
Conclusion	14

Table of Cases Cited

Anderson National Bank v. Luckett, 321 U. S. 233	11
Bullock v. Cooley, 225 N. Y. 566	11
Hamilton et al. v. Regents of the University of California et al., 293 U. S. 245	11
Levitch v. Board of Education, 243 N. Y. 373	12
Ross v. Wilson, 308 N. Y. 605	12
Snowden v. Hughes, 321 U. S. 1	13
Thompson v. Wallin, 276 App. Div. 46, 301 N. Y. 476, 342 U. S. 801	11
United States v. Nugent, 346 U. S. 1	11

Statutes Cited

Article 78 of the Civil Practice Act	12
New York State Education Law § 310	11
28 U. S. C. A. 1343(3)	9, 12
United States Constitution; Fourteenth Amendment	9

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Respondents New York City Board of Higher Education and Brooklyn College, for their statement in opposition to petitioner's application for a writ of certiorari, respectfully show the following:

1. Statement of Issue

The issue herein is whether the dismissal of petitioner from Brooklyn College and the denial of his appeal by the Commissioner of Education deprived him of any right, privilege or immunity secured by the Constitution of the United States or by any act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

2. The Facts

In this civil rights case, petitioner, proceeding on a typewritten petition, seeks a writ of certiorari to have this Court review an order of the United States Court of Appeals for the Second Circuit, entered September 21, 1959, which affirmed an order of the United States District Court, Eastern District of New York, granting respondents summary judgment dismissing petitioner's complaint in an action brought under 28 U.S.C.A. 1343 (3).

The affirmance by the United States Court of Appeals is reported in 271 F. 2d 43. Chief Judge Clark dissented from the majority holding. The decision of Judge Rayfiel of the District Court is reported in 161 F. Supp. 549.

Since the present application is presented on typewritten paper, which include numerous exhibits, it is not possible to give folio references. The following facts are undisputed.

(1)

Petitioner was suspended as a student of Brooklyn College effective March 3, 1955, for the remainder of the Spring 1955 term after the College President had received letters admittedly written by petitioner accusing the President, college officers, administrators and teachers of vile indecencies, blatant injustices, punitive intimidation and sham and disgraceful actions and with engaging in unscrupulous and high-handed tactics.

In September, 1955, petitioner requested permission to resume his college studies and stated that he fully realized where the authority and legal responsibility rested at Brooklyn College. He admitted his mistakes in resorting to undignified expressions and promised to abide by the regulations of the college and to conform to the manners and morals prescribed for proper student conduct. On this basis petitioner was permitted to register as a student.

Thereafter, Herbert Stroup, Dean of Students, found it necessary to admonish petitioner that "continued infraction of your agreement can only lead to serious disciplinary action by the college." For the Fall 1956 term petitioner was prohibited from holding officerships or memberships in any student organizations.

Petitioner admitted writing the following statement which appeared in the "Kingsman", a Brooklyn College student publication, on September 20, 1956:

> "Dean Stroup's most recent abuse of his disciplinary powers is indicative of the discriminatory and vindictive policies which have become typical of the administration of Brooklyn College. The failure to state specific reasons which might justify such prohibitions of my extra curricular activities and the Dean's refusal to grant me a hearing before the Faculty Committee on Orientation and Guidance or a student committee of the Executive Council proves his avowed disrespect for the principles of due process and academic freedom. I intend to appeal this decision to President Gideonse in the hope that it might prove beneficial in easing the strained faculty student relations which have existed for so long at B. C."

On September 21, 1956, Dean Stroup wrote petitioner as follows:

> "In accordance with repeated oral and written warnings in the past by me and several other college officials, and because of your continued disregard for the rules and regulations of Brooklyn College, your continued indulgences in untruthful statements about college officers and the college and your patent unwillingness to heed the injunctions of the college authorities, I am hereby suspending you beginning with the class sessions on Monday, September 24, 1956, for the remainder of the term.
>
> "Contrary to your public assertion and in keeping with actions which you have taken in the past, I

am hereby informing you that you now have appeal recourse to the President of the College."

Additional correspondence was exchanged between Dean Stroup, President Gideonse, the petitioner and his parents. Petitioner, during the course of this second suspension, appeared on the campus, distributed correspondence and leaflets and endeavored to attend meetings of the Executive Council.

On December 10, 1956, petitioner applied for reinstatement. He was interviewed by the Faculty Committee on Orientation and Guidance. Upon the unanimous recommendation of the committee, the Faculty Council by majority vote recommended that petitioner be dismissed from Brooklyn College. In advising petitioner of the Council's action, President Gideonse wrote in part as follows:

> "A careful study of your record before and after your first and during your second suspension indicates continuous and repeated disrespect for college rules and a deliberate intention not to change your conduct after repeated warnings and counseling. I do not need to remind you at this stage that every student admitted to Brooklyn College signs a pledge to observe college regulations, and that the by-laws of the Board of Higher Education provide that students shall obey all the rules and regulations of duly established college authorities, that they shall give punctual and courteous attention to all college duties, and that they shall conform to the requirements of good manners. The charges in your case indicate a disregard of clear and repeated instructions regarding your presence and conduct on the campus during the period of your suspension, the use of abusive language in letters addressed to college officers, and evidence of deliberate intention to continue such conduct."

Petitioner appealed to the Board of Higher Education. After a hearing the appeal was dismissed. Petitioner

sought to review the Board's action in an appeal to the Commissioner of Education. After examining the record, and conducting a hearing, the Commissioner decided (78 [N. Y.] State Dept. Rep. 65) that there was no basis for interfering with the action of the Board and dismissed the appeal. In a decision reported in 78 [N. Y.] State Dept. Reports 85, the Commissioner disallowed petitioner's application for reargument.

(2)

The petitioner thereupon instituted an action in the United States District Court for the Eastern District of New York by the service of a complaint in which he demanded "immediate reinstatement as a student at Brooklyn College, or an order remanding the case to the Faculty Council of Brooklyn College for a new judgment based upon a trial incorporating adequate procedural safeguards."

In his complaint petitioner alleged that he was maliciously suspended by Dean Stroup, which suspension was arbitrarily sustained by President Gideonse; that subsequently he was unlawfully dismissed by the Brooklyn College Faculty Council; that the Board of Higher Education illegally denied his request for a fair hearing upon his trial; and that the Commissioner acted unconstitutionally in refusing to reverse the Board's action. Petitioner asserted that such action by state and municipal authorities violated those provisions of the Fourteenth Amendment which guard against deprivation of liberty without due process and the denial of equal protection of the laws. His complaint also charged deprivation of liberty and abridgement of freedom of speech through statements made in a report of the Faculty Committee and in the allegedly "invalid application of the Board's by-laws, as well as in various statements attributed to faculty members."

Petitioner claimed further that he was denied due process when suspended and dismissed without receiving a full and specific bill of particulars; when not informed of written and specific charges prior to his meeting with the Faculty Committee; that his presentation and rebuttal before both the Board of Higher Education and the Commissioner of Education were thereby rendered deficient; that the lack of cross-examination prevented him from establishing bias and malice; that the time limits prescribed for presentation of arguments before the Board of Higher Education and the Commissioner of Education were unreasonable and insufficient; that the Faculty Committee demonstrated a lack of good faith and partiality and due process, and finally, that review by the Board of Higher Education lacked both due process and reciprocity. Petitioner stated that he was denied equal protection of the laws because other students made public statements derogatory of Brooklyn College practices and have gone unpunished. He concluded that students of public institutions are entitled to the equal protection of the laws insofar as the freedoms of the First Amendment are concerned.

The Board of Higher Education served and filed an answer to the complaint and pleaded a general denial and asserted three separate and complete defenses, namely, failure to state a claim, full compliance with the applicable regulations and statutes, and *res judicata*.

The Commissioner of Education moved to dismiss the complaint for lack of jurisdiction over the subject matter on the following grounds: failure to state a cause of action under subdivision 3, Section 1343, Title 28 of the United States Code; failure to state a constitutional question; failure to show any violation by the Commissioner of the provisions of the Fourteenth Amendment; and full compliance with the applicable regulations and statutes.

The Board of Higher Education joined in the Commissioner's motion to dismiss and urged as grounds therefor the following: failure to state a claim upon which relief could be granted; *res judicata* by reason of a prior decision of the Commissioner; and failure to show deprivation of any right, privilege or immunity guaranteed by the Federal Constitution.

(3)

In an exhaustive opinion, reported in 161 F. Supp. 549, which considered defendants' motions to dismiss as motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, the District Court dismissed the complaint. In doing so, Judge Rayfiel reviewed the entire record including the correspondence between the petitioner and the officials of Brooklyn College and all the papers submitted to the Commissioner. Judge Rayfiel found that the Board of Higher Education not only had the power to prescribe conditions of students' admission, attendance and discharge, but also that the Board had prescribed that each student shall obey all the rules, regulations and orders of the duly established college authorities and shall conform to the requirements of good manners. The Judge also found that Dean Stroup was authorized to suspend a student for a period not to exceed one term and that he could recommend dismissal which might be imposed by the College President or by a majority vote of the Faculty Council.

The District Court also considered those provisions of the Education Law (Section 310) which relate to appeals to the Commissioner of Education and held that the practice on appeals to the Commissioner has been sustained as constitutional. In dismissing the complaint, the Court also noted that petitioner had failed to exhaust all the legal remedies available to him by statutory provision in the courts of New York State.

The United States Court of Appeals, Second Circuit, in a decision reported in 271 F. 2d 13, Chief Judge Clark dissenting, affirmed the decision of the District Court.

The majority of the Court of Appeals, Judges Gibson and Moore, though disagreeing as to jurisdiction, were in complete accord that petitioner had failed to present any question warranting the interference of a federal court. Judge Gibson predicated his holding principally on the ground that education is a state function, subject to restriction by the Federal Government where discrimination against an individual because of race, color or creed occurs. Judge Moore based his ruling principally on petitioner's failure to make out a case on the law or the facts and the absence of a material issue of fact which required a trial.

In his dissenting opinion, Chief Judge Clark accepted as factual allegations petitioner's conclusory descriptions and characterizations of administrative actions at Brooklyn College, before the Board of Higher Education and before the Commissioner of Education. He reached the conclusion that petitioner is now barred from further public education in the State of New York and is therefore entitled to invoke the aid of the federal courts.

Chief Judge Clark relied chiefly on *Brown* v. *Board of Education of Topeka*, 347 U. S. 483 (1954), *Borders* v. *Rippy*, 247 F. 2d 268 (5th Circ., 1957), and *Romero* v. *Weakley*, 226 F. 2d 399 (9th Circ., 1955). However, these cases all involved racial segregation and are clearly distinguishable from the instant proceeding.

ARGUMENT

The petition fails to present any substantial questions for review by this Court.

(1)

Petitioner in his complaint asserts jurisdiction in the District Court under 28 U.S.C.A. 1343 (3), which provides as follows:

> "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: * * *
>
> "(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage of any right, privilege or immunity secured by the Constitution of the United States or by any act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States; * * *."

He alleges that he has a just grievance under the Fourteenth Amendment of the United States Constitution, in that the state and municipal authorities have violated those provisions which read:

> "No state shall * * * deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Initially, we would point out that petitioner's right to attend Brooklyn College is not secured by the Constitution of the United States or by any Act of Congress but is predicated rather on reasonable conditions lawfully imposed by the college authorities pursuant to the authorizations found in the New York State Education Law and in the by-laws of the Board of Higher Education. Among the latter is the specific provision that each student shall obey all rules, regulations and orders of the duly estab-

lished college authorities and shall conform to the requirements of good manners and good morals.

Any doubt as to petitioner's awareness of these provisions prior to the incidents leading up to his initial suspension is clearly non-existent insofar as incidents subsequent to his reinstatement are concerned. Before his reinstatement petitioner stated that he fully realized where the authority and legal responsibility lie at Brooklyn College. In his petition for certiorari, he asserts for the first time in these proceedings that the "good manners" requirement is vague.

Shortly after his reinstatement, and in spite of his admitted realization as aforesaid, petitioner continued to disregard the rules and regulations of the college, refused to obey the orders of the college authorities, and resorted to abusive, intemperate, vituperative and indiscreet language in referring to the administration of Brooklyn College. Upon evidence of a deliberate intention on his part to continue such conduct the petitioner, after a hearing, was dismissed in accordance with the applicable procedural regulations.

It is not now open to question that petitioner conducted himself as described above. Petitioner has never denied this conduct. Indeed, the voluminous exhibits annexed to the motion papers filed in behalf of the Commissioner of Education in the District Court established conclusively that the pattern of conduct which petitioner, over his signature, set as acceptable for himself did not conform to the collegiate requirements of good manners and obedience to the rules and regulations of the college.

The petitioner herein demands a free college education from the municipal authorities and at the same time insists that he shall be exempt from the reasonable conditions lawfully imposed by the college administrators to regulate the admission, attendance and discharge of students in the municipal college.

In *Hamilton, et al. v. Regents of the University of California, et al.*, 293 U. S. 245 (1934), a case analogous to the one at bar, this Court said (p. 262):

> "Taken on the basis of the facts alleged in the petition, appellant's contentions amount to no more than assertion that the due process clause of the Fourteenth Amendment as a safeguard of 'liberty' confers the right to be students in the state university free from obligations to take military training as one of the conditions of attendance.
>
> "Viewed in the light of our decisions that proposition must at once be put aside as untenable."

It is well settled that the due process clause of the Fourteenth Amendment was not designed to interfere with the power of a state to prescribe reasonable regulations to promote health, peace, morals, education and the good order of the people, *Thompson v. Wallin*, 276 App. Div. 463 (3rd Dept., 1950), aff'd 301 N. Y. 476 (1950), cert. denied 342 U. S. 801 (1951). Nor has the due process clause been interpreted to require in administrative hearings or appeals all those safeguards which are requisite to a judicial trial, *United States v. Nugent*, 346 U. S. 1 (1953); *Anderson National Bank v. Luckett*, 321 U. S. 233 (1944).

(2)

The New York State Education Law § 310 provides for appeals to the Commissioner of Education. The petitioner herein appealed to the Commissioner after he had been denied relief by the Board of Higher Education. The constitutionality of the Commissioner's appellate jurisdiction and the procedure involved in such appeals has long been recognized, *Bullock v. Cooley*, 225 N. Y. 566 (1919).

At every step in the proceedings, the administrative agencies complied with their bylaws, rules and regulations and all applicable statutory provisions. Nowhere was peti-

tioner treated arbitrarily or unfairly. At every hearing he was informed of the nature of the charges made against him and was afforded an opportunity to file papers and to argue orally in opposition. There is no denying that before the Commissioner both the petitioner and the Board received equal treatment.

When the Board of Higher Education rejected his appeal petitioner could have (1) appealed to the Commissioner of Education, (2) pursued his remedy in the New York State Courts pursuant to Article 78 of the Civil Practice Act, or (3) turned to the Federal Courts under 28 U.S.C.A. 1343 (3). Petitioner appealed to the Commissioner of Education and thus effected a complete election of remedies, *Levitch* v. *Board of Education*, 243 N. Y. 373 (1926).

Following the denial of his appeal by the Commissioner of Education, petitioner could still have applied to the New York State Supreme Court for review under Article 78 of the Civil Practice Act, *Ross* v. *Wilson*, 308 N. Y. 605 (1955). However, petitioner abandoned this remedy and sought relief in the federal courts. Petitioner has, we submit, foreclosed federal court review of the Commissioner's decisions by failing to proceed in the courts of New York State.

(3)

It is apparent from the complaint that petitioner does not challenge the validity of the rules, regulations, bylaws and statutes under which he was expelled and under which his several appeals were heard and rejected but does challenge the manner in which such rules and regulations were applied in his case. For example, the complaint alleges that the actions of the state and municipal officers were malicious, arbitrary, unlawful, illegal and resulted in an invalid application of the bylaws. However, the complaint does not allege any facts tending to show an intentional discrimination against petitioner personally or as a mem-

ber of a class. Accordingly, quite apart from the conclusory character of the allegations in the complaint, the petitioner has clearly failed to state a substantial question involving the Federal Constitution.

This Court in passing upon a similar problem in *Snowden v. Hughes*, 321 U. S. 1 (1943), involving the right of a citizen to be a candidate for and to be elected to State office said (p. 7):

> "There is no contention that the statutes of the state are in any respect inconsistent with the guarantees of the Fourteenth Amendment. There is no allegation of any facts tending to show that in refusing to certify petitioner as a nominee, the Board was making any intentional or purposeful discrimination between persons or classes."

The Court continued as follows (p. 10):

> "The lack of any allegations in the complaint here, tending to show a purposeful discrimination between persons or classes of persons is not supplied by the approbious epithets 'wilful' and 'malicious' applied to the Board's failure to certify petitioner as a successful candidate, or by characterizing that failure as an unequal, unjust and oppressive administration of the laws of Illinois. These epithets disclose nothing as to the purpose or consequence of the failure to certify, other than that petitioner has been deprived of the nomination and election, and therefore add nothing to the bare fact of an intentional deprivation of petitioner's right to be certified to a nomination to which no other has been certified. Cf. *United States v. Illinois Central R. R. Co.*, 303 U. S. 239, 243."

The Court stated further (p. 11):

> "If the action of the Board is official action, it is subject to constitutional infirmity, to the same but no greater extent than if the action were taken by the state legislature. Its illegality under the state

statute can neither add to nor subtract from its constitutional validity. Mere violation of a state statute does not infringe the federal constitution."

The Court concluded (pp. 11-12):

> "It was not intended by the Fourteenth Amendment and the Civil Rights Acts that all matters formerly within the exclusive cognizance of the states should become matters of national concern.
>
> A construction of the equal protection clause which would find a violation of federal right in every departure by state officers from state law is not to be favored."

Petitioner has failed to present for review by this Court any substantial constitutional question.

CONCLUSION

The petition for a writ of certiorari should be denied.

January 22, 1960.

Respectfully submitted,

CHARLES H. TENNEY,
SEYMOUR B. QUEL,
Attorneys for Respondents
New York City Board of Higher
Education and Brooklyn College,
Municipal Building,
New York 7, N. Y.

SEYMOUR B. QUEL,
JOSEPH F. GIBBONS,
of Counsel.